Supreme Court, U.S.
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No. 02-148

In The Supreme Court of the United States

NARESH ARORA,

Petitioner,

v.

BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES

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QUESTIONS PRESENTED

1. Whether the state appellate court can invoke "hypothetical jurisdiction" to render a valid and lawful judgment when the record discloses that an administrative agency lacks jurisdiction due to non-compliance of mandatory statutory code provisions involving the Due Process Clause of the Fifth and Fourteenth Amendments.

2. Whether the Due Process Clause of the Fifth and Fourteenth Amendments allows a public employer to terminate a permanent civil service employee without any opportunity to be heard "before termination." Further, whether the Due Process Clause of the Fourteenth Amendment allows the state appellate court to render a decision, after a timely petition for rehearing is filed, by affirming the decision of an administrative agency *and* denying the petition for rehearing.

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STATEMENT OF THE CASE

Petitioner, Naresh Arora, worked for the City of Los Angeles' Department of Transportation from 1988 to 1998. During his employment, he had previously sued the City for reasons relating to his taking family leave. Petitioner was discharged from employment on June 23, 1998, following his being voluntarily absent from the workplace since May 22, 1998, without directly contacting his Departmental supervisors, notwithstanding various letters and telephone calls by the Department to apprise him of his responsibility to do so. On May 11, 1998, Arora was transferred to the Signal Timing and Research Section, supervised by Brian Gallagher. Arora first reported to work at Signal Timing on May 14, 1998, following an illness. On May 21, 1998, following Gallagher giving Arora an oral warning regarding the quantity and quality of his assignments, Arora left work early. The following day, May 22, 1998, Arora left a voice mail message for Gallagher that he was ill. On the next workday, May 26, 1998, Gallagher received a voice mail message directing him to a letter sent to him by facsimile. The letter, dated May 25, 1998, informed Gallagher that Arora could not return to work until John Federle, the Department Personnel Officer, "makes my working condition humanly bearable," and further informed Gallagher that a "detailed account of the inhumane conditions . . . imposed" had been forwarded to John Federle, the Department's Personnel Officer, and to Gregory Orland, the Deputy City Attorney representing the Department in the first lawsuit. Gallagher called Arora at home, leaving messages on his answering machine on May 27, 1998, stating that Gallagher would mark Arora absent without leave unless Arora called Gallagher. Gallagher further stated that if Arora were ill for more

than three days, upon Arora's return, a doctor's note would be needed by the Department. Despite the City requirement that employees daily report their absences directly to their supervisors, other than receipt of another letter from Arora, dated May 28, 1998, stating that Arora was still awaiting an apology for the hostile work environment, Gallagher never received any further communications from Arora.

On May 25, 1998, Petitioner's attorney, Raj D. Roy, sent letters to Federle and Orland enumerating a list of six demands that Roy "insisted" be addressed "to alleviate some of my [Roy's] concerns . . . . " The letter states: "You are reminded that Mr. Arora will be able to go to work only when the continuous harassment, and demeaning, subhumane [sic] behavior by Mr. Gallagher is stopped, and a written assurance as per this letter is acknowledged to be received by my office. If we do not receive a satisfactory response by May 28, 1998, we will ask the Court to order sanctions against you." Federle spoke with Orland, who advised Federle that Orland would respond to Roy's letter.

On May 28, 1998, Roy again wrote to Federle. The letter states it was the second notice to respond and asks: ". . . [A]re you a central figure in this unjust plot against Mr. Arora?" The letter asks for a written apology for past harassment and written assurance that such incidents will not recur before Arora will return to work.

On May 29, 1998, Orland responded to the May 28, 1998 letter to Federle from Roy. In Orland's letter, he memorialized his May 26, 1998 telephone conversation with Roy addressing each of the six demands of Roy's May 25, 1998 letter to Federle. Most importantly, the letter notified Roy that " . . . [Y]our client will not be supervised

through attorneys. If your client wishes to take legal action, that is his prerogative. Otherwise, as long as your client is an employee of the City of Los Angeles, he is obligated to work through his supervisorial chain of command like any other employee. If he continues to refuse to speak or otherwise directly communicate with his supervisors, his department may take appropriate responsive action." Federle did not consider either letter from Roy concerning Roy's allegations of unfair treatment as justification for Arora's absence from his job. Moreover, at no time did Arora communicate personally with Federle.

On May 29, 1998, Federle sent Arora a letter entitled "Absence Reporting Requirements." The letter advised Arora that due to his failure to personally communicate with his supervisor since May 21, 1998, he was being considered absent without valid leave. Federle reminded Arora of his responsibility to daily report his absence to his supervisor under the Departmental reporting procedures and informed him that if the situation were to continue, Arora's employment would be in jeopardy. A copy of the letter was also sent to Arora's union representative, Mike Koskie.

On June 15, 1998, due to Arora's continued unauthorized absence from the workplace, Federle sent Arora a Notice of Proposed Discharge. The notice notified Arora that a pre-termination hearing was set for June 19, 1998 at 9:30 a.m. with the Department to be represented by Gina Tervalon, Senior Personnel Analyst. The notice was also sent to Mike Koskie, Arora's union representative. The notice stated that Petitioner had until 4:00 p.m. on June 19, 1998 to respond either orally or in writing. Arora did not appear at the hearing, nor did he send a representative or communicate in any way with the Department.

Federle then prepared the Notice of Discharge, Form 77 and recommended Petitioner's discharge to the General Manager, Thomas Swire, who approved the discharge.

The signed Notice of Discharge (commonly referred to as Form 77) was served at Arora's residence on June 23, 1998, by Brian Gallagher, in compliance with the rules of the Civil Service Commission of the City of Los Angeles. When Gallagher received no response to his knock, he taped the Notice of Discharge to Arora's front door.

On June 24, 1998, Arora filed an Appeal from Discharge with the Board of Civil Service Commissioners.

The administrative hearing was set for July 30, 1998, and Petitioner and his counsel were notified of the procedure for requesting subpoenas of witnesses and that hearing continuances would only be granted if agreed upon by the parties and requested not less than five days prior to the hearing.

On July 20, 1998, Roy requested a continuance of the hearing, which was granted, and requested that the Board issue subpoenas duces tecum and appearance subpoenas on Departmental employees John Federle, Brian Gallagher, Gail Rucker, Richard Jaramillo, Tom Swire and Tom Conner, as well as Gregory Orland (the Department's attorney in Arora's first lawsuit).

On July 24, 1998, the Board requested that the City Clerk issue the subpoenas duces tecum and subpoenas. On August 6, 1998, the Office of the City Attorney filed a Motion to Quash the subpoena duces tecum and appearance subpoena to Gregory Orland. On August 10, 1998, in a letter to the Board, the Department of Transportation moved to quash all or portions of the subpoenas duces

tecum to Federle, Gallagher, Rucker and Jaramillo. The Department also moved to quash the appearance subpoenas to Rucker, Jaramillo and Conner.

On August 28, 1998, the Board secretary advised Roy that the hearing was rescheduled for October 1, 1998, at Roy's request and informed Roy the hearing examiner would address and rule on the motions to quash the subpoenas at the beginning of the hearing.

On September 24, 1998, Roy sent a letter to the Board detailing his requirements for the October 1, 1998 hearing which asserts that (1) the hearing must only address preliminary issues; (2) he has a right to bring video recording equipment; (3) he has a right to bring other associates; (4) he requires that only one witness at a time be in the room; and (5) he requires that he be sent the Manual of Policies and Procedures and Administrative Code, Charter and Civil Service Rules immediately. Roy's letter also stated that if he did not hear any objections by September 24, 1998, he would assume the above requirements are agreeable.

At the October 1, 1998 hearing, when the hearing examiner denied Roy's request to videotape and audiotape the proceedings, indicating there would be only one official transcript of the hearing, Roy stated his intention to leave the hearing. The hearing examiner stated: "I'm just going to tell you and tell him [Arora] that I am prepared to proceed today. And if you choose not to participate, the Department's going to put on their case. And it will be unrebutted by you. That is your choice. But you run the risk of losing your case because you haven't put on any evidence." Despite being informed by the hearing examiner that the hearing would go forward even if they chose

to leave, Arora and his attorney Roy walked out of the hearing – without raising any issue other than their objection to Departmental representation by a City Attorney and their objection over not being allowed to videotape the proceedings and thereby create their own record. The hearing continued in their absence, with the Department presenting its case.

On October 28, 1998, the hearing examiner filed her report recommending the sustaining of Arora's termination with the Board of Civil Service Commissioners. The Board sent Petitioner and his counsel a copy of the report and informed each of them that the Board of Civil Service Commissioners would hear the matter at its regular November 13, 1998 meeting. The letter informed them that exceptions to the report should be filed not less than five calendar days prior to consideration by the Board. On November 11, 1998 (two days before the hearing) Arora faxed exceptions to the report to the Board. On November 12, 1998 (one day before the hearing) Arora faxed another letter of exceptions and requested a continuance due to the unavailability of his counsel. Neither Arora nor anyone on his behalf attended the November 13, 1998 meeting of the Board of Civil Service Commissioners. The Board then adopted the hearing examiner's recommendation upholding the Department's termination of Arora's employment for being absent without valid leave. (Said determination was finalized on November 26, 1998).

Arora timely filed a demand for reinstatement in compliance with Los Angeles Charter § 112½ on December 11, 1998. At its January 22, 1999 meeting, the Board of Civil Service Commissioners denied his demand for reinstatement.

Petitioner Arora filed his Petition for Writ of Mandate pursuant to California Code of Civil Procedure § 1094.5 in the California superior court on February 24, 1999, specifically challenging his termination by contending that the hearing examiner's recommendation to sustain his discharge, and, ultimately, its adoption by the Board of Civil Service Commissioners were erroneous. Additionally, Arora challenged Respondents' actions by alleging that his constitutional due process rights were violated. He subsequently amended his petition to add a cause of action for violation of 42 U.S.C. §§ 1983 and 1988.

SUMMARY OF ARGUMENT

There is no compelling interest in this matter warranting review by this court. There is no conflict of decisions raised herein. The decision in this matter turns on its own facts and has no federal impact. Both the California trial court and appellate court correctly exercised their authority. The state courts determined that Petitioner is not entitled to a Writ of Mandamus because his employment was properly terminated for unexcused absence from work and for no other reason.

REASON WHY THE PETITION SHOULD BE DENIED

The State Court's Decision Was Based Solely On Independent State Grounds

The opinion of the state court below (App.1[1]) conclusively shows that Petitioner's termination was due to his being absent from the workplace without authorization and for no other reason, and that the court determined, pursuant to state statutes and case decisions, that at every step of the way Petitioner was afforded the opportunity to present his side.

As this Court explained in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972): "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." *Roth* at p. 577. In California, the terms and conditions of public employment are generally "fixed by the statute, rules or regulations creating it, . . . " *Williams v. Los Angeles City Dept. of Water and Power,* 130 Cal. App. 3d 677, 680 (1982); see also *Miller v. California,* 18 Cal. 3d 808, 813-14 (1977). A claim of entitlement is created by civil service rules and regulations governing public employment. *Roley v. Pierce County Fire Protection Dist.*, 869 F.2d 491 (9th Cir. 1989).

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[1] The Unpublished California Court of Appeal Opinion, *Arora v. Board of Civil Service Commissioner*, 2002 Cal.App. Unpub. LEXIS 4111 (February 7, 2002) is contained in the Respondent's Appendix.

For more than twenty-five years, the statutes and rules of the Civil Service Commission of the City of Los Angeles have reflected the California Supreme Court's holding in *Skelly v. State Personnel Bd.,* 18 Cal. 3d 395, 556 P. 2d 306 (1976) (which followed this Court's decision in *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974)) in providing the procedural safeguards mandated by the state and federal constitutions. The *Skelly* court held that civil service provisions which provided for a hearing only after an employee was dismissed or otherwise disciplined did not fulfill minimum constitutional demands. In so holding, the court made clear that "due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the taking of punitive action." Rather the court determined that due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, required that, at a minimum, the "preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing to the authority initially imposing discipline."

In this matter, the state appellate court determined that, pursuant to state decisional law, these requirements were met since Petitioner knew of the charges against him (by the previous letters from his Department) and he had an opportunity to respond (he could have contacted the Department upon receipt of the notice and rescheduled the hearing). See *Skelly, supra*, 18 Cal. 3d 395 at p. 215. Further, the state court found that, pursuant to state decisional law, Petitioner, who had the opportunity to raise the issue of the untimeliness of the pre-termination notice

at his administrative hearing, waived his due process right to an opportunity to be heard and present his side when he walked out of the administrative hearing without raising these issues. See *Mims v. Los Angeles Community Coll. Dist.*, 117 Cal. App. 3d 352 (1981).

The state court, in affirming the decision of the trial court in denying Petitioner's petition for writ of mandamus, placed its judgment entirely on adequate state grounds which were broad enough to sustain it.

CONCLUSION

As stated above, there is no compelling reason for this Court to grant a writ of certiorari in this case. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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1. Unpublished Opinion of the California Court of Appeal, Second Appellate District, Third Division, February 7, 2002 ..... App. 1

2002 Cal. App. Unpub. LEXIS 4111
printed in FULL format.

NARESH ARORA, Plaintiff and Appellant, v. BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES, Defendants and Respondents.

B141389
COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE
2002 Cal. App. Unpub. LEXIS 4111

February 7, 2002 Filed

NOTICE:

NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

SUBSEQUENT HISTORY: As Modified February 28, 2002. Petition for Rehearing Denied February 28, 2002. No Change in Judgment

PRIOR HISTORY: Appeal from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BS 055816. David P. Yaffe, Judge.

DISPOSITION: Affirmed.

COUNSEL: Naresh Arora in Propia Persona.

James K. Hahn, City Attorney, Leslie E. Brown, Assistant City Attorney, and Zna P. Houston, Deputy City Attorney, for Defendants and Respondents.

JUDGES: CROSKEY, J. We concur: KLEIN, P.J., KITCHING, J.

OPINION BY: CROSKEY

OPINION:

Naresh Arora (employee) was discharged from his job with the City of Los Angeles (employer) for being absent without valid leave. He pursued his administrative remedies, but the Board of Civil Service Commissioners (Board) ultimately found in employer's favor. His petition for a writ of administrative mandamus was denied, and h cause of action for violation of civil rights was also dismissed. He now seeks review of the trial court's decision. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND [1]

From 1988 to 1998, employee worked for employer's Department of Transportation (the Department) as an engineering assistant and then as an engineering associate. His employment led him to sue his employer for reasons related to taking family leave (the first lawsuit). While that suit was proceeding, he was transferred to a different section, where his supervisor was Brian Gallagher. He reported to Gallagher on May 14, 1998, following an illness. A week later, after Gallagher orally warned him about the quality and quantity of his work, he left early, on May 21. The next day, he called in sick. On the next workday, May 26, he called and told Gallagher he was

[1] We recite facts taken from the Respondent's Appendix and the Appellant's Appendix in Lieu of Clerk's Transcripts.

sending Gallagher a facsimile message. That facsimile message, a letter dated May 25, stated that he would not return to work until John Federle, the Department's Personnel Officer, made his working conditions "humanly bearable." Employee sent a copy of this demand to Federle as well as to Gregory Orland, a Deputy City Attorney representing employer in the first lawsuit.

According to employer's personnel manual, employee was required to take certain steps in order to be absent with leave. For example, if he was going to be gone for more than three days because of illness, he needed a doctor's note upon his return, and he also needed to check in with his employer on a daily basis. Gallagher contacted employee and reminded him of these requirements. Employee did not follow these requirements. Instead, his attorney in the first lawsuit sent a letter to Federle and Orland demanding certain changes to employee's working conditions, and accusing Gallagher of certain demeaning and "subhuman" behavior. Employer, via Gallagher, reminded employee that he would be considered absent without valid leave if he did not make a daily report to his employer, and that he could lose his job if he did not comply.

Things continued in this vein until employee had been absent without approved leave for almost a month. By letter dated June 15, 1998 and entitled "Proposed Discharge – Absent without Valid Leave," Federle notified employee that employer's records showed employee had been absent without valid leave since May 22, 1998, and that this was sufficient cause for discharge. Employer's attempts to contact employee were described, as were the previous warnings given to employee. The letter told employee that failure to act in one of two ways by June 19,

1998 "will result in final consideration of your proposed discharge"; those two actions were to either report to work (and be subject to later discipline for being absent without valid leave) or submit a written resignation (using the enclosed resignation form). The June 15 letter also invited employee to respond to the charge of being absent without valid leave either in writing or orally. It informed him that there would be a hearing on June 19, 1998, a *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 hearing, at a specified location and time. It further warned him that if he had not taken one of the two described actions or responded by 4 p.m. on June 19, 1998, employer would proceed with the proposed discharge based on the charge of being absent without valid leave. Employee, who asserted that he did not receive the June 15 letter until June 20, 1998, did not attend the June 19 hearing or otherwise respond in any way. At that point, Gallagher went to employee's home and posted a "Notice of Discharge" on the door after employee failed to answer his knock. The next day, employee filed an "Appeal from Discharge" with the Board.

The Board set an administrative hearing and notified the parties of applicable procedures. At employee's attorney's request, the hearing was continued, and employee asked the Board to issue subpoenas duces tecum and appearance subpoenas to six Department employees, and to Orland. These subpoenas asked for some materials that appeared to be irrelevant and/or privileged attorney/client communications. Employer moved to quash all or some portion of the subpoenas duces tecum for four of the employees, and, as to two employees, simply responded that there were no responsive documents.

The hearing was set for October 1, 1998, and the motion to quash was scheduled to be heard at the beginning of the hearing. Employee's attorney sent the hearing officer, Jill Klein, a letter setting out his requirements for the hearing, including that (1) the hearing only address preliminary issues, (2) he be allowed to videotape the proceedings, (3) he be allowed to bring associates, (4) only one witness at a time be allowed to attend the hearing, and (5) he immediately be given a copy of the polices and procedures manual and charter and civil service rules.

At the hearing, Klein denied employee's request to videotape the proceedings, indicating that there would be only one official transcript of the hearing. In addition, she also said that the hearing would proceed that day, and warned employee that if he failed to put on any evidence, he could lose his case. Employee and his attorney simply objected to the Department being represented by a city attorney, and that they could not videotape the proceedings. They left, and did not put on any evidence. However, the Department remained and put on its case.

On October 28, 1998, the hearing officer filed a report with the Board recommending that employee's termination be upheld. Both parties were given a copy of the report and told that the Board would consider the matter on November 13, and that exceptions to the report should be filed no later than five days before the Board's hearing. One day before the hearing, employee faxed the Board a letter of exceptions and requested a continuance due to his attorney's unavailability. Neither employee nor an attorney on his behalf attended the November 13 hearing, and the Board adopted the hearing officer's recommendation upholding employer's termination of employee's employment.

Employee, following the administrative procedure, made a demand for reinstatement, which was denied. He then filed a petition for a writ of administrative mandamus. He contended that his procedural due process rights had been violated, and also that the hearing officer's recommendations were not supported by the evidence. In connection with the petition, he sought further discovery, which the trial court denied, restricting him to the administrative record as a basis for the hearing on his petition.

Employee then amended his petition to add a cause of action for violation of 42 U.S.C. sections 1983 and 1988, and named some additional defendants. The trial court denied the amended petition, and dismissed the new cause of action. Employee's motion for a new trial was also denied.

CONTENTIONS ON APPEAL

Employee contends that the record shows that he was denied due process before he was terminated from employment, and that he was terminated in retaliation for exercising his constitutional rights. He further contends that the Board acted in excess of its jurisdiction and in violation of the city's charter, that it did not proceed in the manner required by law, its decision was not supported by the findings, and that the evidence does not support its findings.

Employee also contends that he was denied his constitutional rights to compel attendance of witnesses, to cross-examine them at the administrative proceeding, to be heard, and to a continuance so that he could be represented by counsel. In addition, he contends the trial court lacked subject matter and personal jurisdiction over his 42

U.S.C sections 1983 and 1988 causes of action, and that it wrongfully dismissed such causes of action. Finally, he contends the trial court erred by denying his motion for a new trial, and by failing to provide him with a statement of decision.

DISCUSSION

1. Standard of Review

In ruling on a petition for a writ of administrative mandamus, the trial court reviews the administrative record to determine whether the agency's decision is supported by substantial evidence in light of the whole record. (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610; *California State Auto. Assn. Inter-Ins. Bureau v. Garamendi* (1992) 6 Cal.App.4th 1409, 1418.) The court must consider all relevant evidence in the record, but "'it is for the agency to weigh the preponderance of conflicting evidence. [Citation.] Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.'" (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th at p. 610, italics omitted, quoting *McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal. App. 3d 175, 186, 131 Cal. Rptr. 462.) "The standard of review for [the appellate] court is identical: We, too, determine whether substantial evidence supports the administrative decision. [Citation.]" (*Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 916 and cases cited there.) If no challenge to the factual findings is made, an appellate court need only determine whether the administrative agency's ruling was so arbitrary and capricious as to amount to an abuse of discretion. (Ibid.)

Here, the Board found employee was fired for being absent without a valid leave. In other words, employee did not met his burden of proving he was entitled to reinstatement. The question before the trial court, and before us, is whether there is substantial evidence to support the administrative determination. In addition, we independently review the legal question of whether employee's procedural rights were violated during the hearing process, although to the extent such issues depend on conflicting evidence as to the underlying facts, we defer to the agency's and/or lower court's factual determinations, and assume the facts were such as support the lower tribunals' determinations. (*Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 73.)

2. Employee Was Not Denied Due Process Before Being Terminated

Due process is simply notice and an opportunity to be heard. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286.) Employee was given due process. He was given notice of the various hearings, and an opportunity to participate. He was told the reason for his termination. This reason, absence without a valid leave, was a reason for discharge listed in Department's Manual of Policies and Procedures. The evidence showed he was warned that termination could be the penalty if he failed to return before a certain date, and the applicable section of the Manual, dated 6/96, made it clear not only that the penalty of discharge was a possibility, but that an employee absent for more than seven days could be considered to have abandoned his or her job.

Employee's failure to participate in the hearing, given that he received notice and an opportunity to be heard, does not constitute a denial of due process. (*Britz, Inc. v. Dow Chemical Company* (1999) 73 Cal.App.4th 177, 185.) When employee left the hearing before the Board because he was unhappy with the procedure being used, he was not denied due process. And, because he left the hearing and did not participate, he failed to raise the issue of whether the notice of his hearing pursuant to *Skelly v. State Personnel Bd., supra,* 15 Cal.3d 194 (the June 1998 letter) was adequate or not, and thus waived that issue.

Even if he had raised the issue before the Board, the evidence before the hearing officer was such that the Board could have found that the *Skelly* notice was adequate. Employee admitted he received the June 15, 1998 letter, albeit not until June 20, 1998. Upon its receipt, employee could have contacted employer and informed employer he had received the notice late, and asked for a *Skelly* hearing on a date after June 19, because of late receipt of the letter. He did not do so, either before or after he was officially terminated on June 23, 1998. Under *Skelly,* all that is required in the way of pre removal safeguards is notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. (*Skelly, supra,* 15 Cal.3d at p. 215.) These requirements were met in this case. In addition to the June 15, 1998 letter, employee also had been given a May 29, 1998 letter warning him that if he failed to report his absence from work to his supervisor on a daily basis, he could be placed on an Absent without Valid Leave status, and his employment status could be in jeopardy. Thus, his situation is

factually distinguishable from *Shannon v. City of Los Angeles* (1928) 205 Cal. 366, 270 P. 682, the case on which employee relies. In that case, the employee never received written notice of the charge against him, and the evidence showed the notice was sent to an address at which he had never resided. Here, it is readily apparent that employee received notice, and that the requirement of due process was met: employee knew the charge against him and had an opportunity to respond to the charge.

More on point are the cases of (1) *Bussey v. Los Angeles Civil Service Commission* (1977) 72 Cal.App.3d 912, 922, in which, although the employee failed to attend the *Skelly* hearing (having received but overlooked the notice of such hearing), the reviewing court concluded that *Skelly's* requirements were satisfied by the employer's earlier warnings and identification of the problem behavior and the result to which such behavior could lead, if not corrected, and (2) *Mims v. Los Angeles Community College Dist.* (1981) 117 Cal.App.3d 352, 357-358, in which the employee could have, but did not, raise the issue of the untimeliness of the pre-termination notice before the personnel commission that reviewed the decision to terminate.

3. The Evidence Showed that Employee Was Terminated for Being Absent Without Valid Leave

The evidence presented to the hearing officer showed that employee was absent without valid leave. The Board accepted this evidence, too. As noted above, " '[i]t is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the

agency.'" (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th at p. 610, quoting *McMillan v. American Gen. Fin. Corp., supra,* 60 Cal.App.3d 175, 186.) Here, a reasonable person *could* reach the conclusion reached by the Board; accordingly, we must affirm.

4. The Board Did Not Act in Excess of its Jurisdiction or in Violation of the City's Charter and Its Decision Was Supported by the Evidence

Employee apparently thinks the Board acted in excess of its jurisdiction because he was never properly served with notice of discharge, and because "the administrative record is completely silent if the accusatory pleading was ever filed with the Board," both procedural requirements set out in the City Charter. As employer points out, the evidence showed employee *was* served with notice, and that the Board received the accusatory pleading, as shown by its minutes of July 31, 1998. Its decision that employee was terminated for being absent without valid leave was made in compliance with the applicable procedure, and was fully supported by the evidence.

5. Employee Was Not Denied Any Constitutional Rights

Employee also contends that he was denied his (1) constitutional right to compel attendance of witnesses and to cross-examine them at the administrative proceeding, (2) right to be heard, and (3) right to a continuance so that he could be represented by counsel. These contentions are without merit. Employee had the right to call witnesses, and, in fact, Board issued subpoenas to compel their attendance. He was not precluded from cross-examining

them as to relevant matters. Furthermore, employee points to no authority that he had an absolute right to a continuance when he requested a continuance at the last minute with no good reason for such delay. On this record, we find no procedural actions that deprived him of any constitutional rights.

6. The Trial Court Had Jurisdiction Over the 42 U.S.C. Causes of Action, and Properly Dismissed Such Causes of Action

Employee contends that the trial court lacked personal and subject matter jurisdiction over his causes of action for violation of 42 U.S.C. sections 1983 and 1988, as set out in his amended petition. This contention is patently without merit. First, by filing the amended petition seeking relief for such violation, he consented to personal jurisdiction. (*In re Marriage of McDonough* (1986) 183 Cal.App.3d 45, 52, 227 Cal.Rptr. 872.) Furthermore, state superior courts have concurrent subject matter jurisdiction over such claims. (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1170.)

Because the evidence in the administrative record showed that employee was terminated for being absent without valid leave, it follows that he was not terminated for exercising protected constitutional rights. If he was not terminated for exercising protected constitutional rights, his section 1983 and 1988 causes of action were not viable, and the trial court properly dismissed them. (See *Mata v. Superior Court* (1993) 20 Cal.App.4th 141, 149-150 [a tort action pursuant to 42 U.S.C. § 1983 based on allegedly wrongful termination is not authorized unless an employee prevails in his or her petition for administrative mandamus on such issue].)

7. The Trial Court Did Not Err as to the Statement of Decision

Employee contends that the trial court was required to provide a statement of decision with findings for all controverted facts. Here, the trial court stated that its tentative decision would be deemed its statement of decision, a technique allowed by California Rules of Court, rule 232(a). Contrary to employee's assertions, the statement of decision specifically stated that the court had independently reviewed the administrative record, and concluded that the weight of the evidence supported the Board's decision, thus showing the trial court applied the correct standard of review. In addition, by so stating, the trial court's statement of decision incorporated by reference the findings of ultimate fact made by the Board, making it sufficiently detailed. (*Angelier v. State Board of Pharmacy* (1997) 58 Cal.App.4th 592, 597.)

8. The Trial Court Did Not Err by Denying the Motion for a New Trial

Employee contends the trial court erred by not granting his motion for a new trial. There are certain statutory bases for granting such a motion. (Code Civ. Proc., § 657.) Although employee raised many of them in his motion, upon review, we find no basis upon which the trial court should have granted the motion. DISPOSITION

The judgment is affirmed. The defendants are awarded their costs on appeal.

CROSKEY, J.

We concur:

KLEIN, P.J.

KITCHING, J.